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7 **BEFORE THE STATE OF WASHINGTON**
ENERGY FACILITY SITE EVALUATION COUNCIL

8 In the Matter of
9 Application No. 99-1

10 SUMAS ENERGY 2
11 GENERATION FACILITY

INTERVENOR DEPARTMENT OF
ECOLOGY'S RESPONSE TO
NESCO'S MOTION FOR
RECONSIDERATION

12 **I. INTRODUCTION**

13 In Posthearing Order No. 4, Council Order No. 756, the Council requested that the
14 applicant and intervenors provide their opinion whether, given the applicant's proposed changes
15 to the site certification agreement, new public hearings would be necessary in order to comply
16 with the federal and state Clean Air and Clean Water Act requirements. The opportunity for
17 public comment on applications for permits is a major component of the Clean Air and Clean
18 Water Acts. Given the applicant's proposed changes to the project, the Department of Ecology
19 (Ecology) asserts that the Council should require the applicant to file an amended application
20 incorporating all of its proposed changes. Once the application is distributed, the Council
21 should, at a minimum, allow an opportunity for the public to provide written comment on the
22 reconfigured project. If sufficient interest is demonstrated, the Council should hold public
23 hearings on those aspects of the project related to air and/or water quality.

24 While the applicant asserts that the modifications it offered will reduce the project's
25 overall impacts to the environment, that claim cannot be verified until the proposed changes are
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1 scrutinized by the Council, the intervening parties and the public. Until that exercise is
2 complete, the magnitude of the proposed changes will not be known. In light of the public
3 interest in this project, the Council should seek additional public comment on the modifications
4 proposed by the applicant in its Motion for Reconsideration.

5 **II. ARGUMENT**

6 **A. Air Permit.**

7 The Council adopted by reference several Ecology regulations regarding air pollution
8 sources, including WAC 173-400-171 governing public involvement. WAC 463-39-005. Under
9 WAC 173-400-171(1), Ecology is required to provide public notice in a variety of enumerated
10 instances. Although the unique circumstance of this case is not specifically stated, WAC 173-
11 400-171(1)(j) serves as a catch all provision, stating that public notice is required where “there is
12 a substantial public interest” in the application. Therefore, under that provision, public notice of
13 the applicant’s proposed changes may be mandatory; regardless, the most prudent course would
14 be for the Council to exercise its discretion and require public notice pursuant to WAC 173-
15 171(1)(j). Finally, whether a public hearing should be held is at Ecology’s discretion if
16 “significant public interest exists.” WAC 173-400-171(4).

17 In this case, there is clearly public interest regarding the potential impacts to air quality if
18 the facility is constructed. The applicant has attempted to address those concerns by proposing a
19 variety of changes to its original proposal, some of which go to the heart of the air quality
20 criticisms raised by the public and intervenors. Although it is not mandated, Ecology believes
21 that, given the scrutiny this aspect of the project has received by the public, the Council should
22 exercise its discretion under WAC 173-400-171(1)(j) to require public notice of the changes to
23 the project and accept written public comment on those modifications. If significant public
24 interest is demonstrated during the public comment period, the Council should also hold a public
25 hearing to accept additional comments.

1 **B. Section 401 Certification.**

2 Unlike the incorporation by reference of Ecology's air pollution regulations, the Council
3 has not adopted any regulations relating to the issuance of a Clean Water Act Section 401
4 Certification. The Ecology regulations governing water quality certification are found in ch.
5 173-225 WAC. Given the purposes behind the water quality laws and the public participation
6 component, it makes sense to use the normal processes here.

7 In this case, because the applicant intends to fill wetlands, a Clean Water Act Section 404
8 Permit (404 Permit) is required, triggering the corresponding requirement to obtain certification
9 from Ecology under Section 401 (401 Certification) that the project, as proposed, will meet water
10 quality standards and any other appropriate requirement of state law. 33 U.S.C. § 1341. Under
11 WAC 173-225-030, when an application for a 401 Certification is received, Ecology is required
12 to provide public notice of the application and receive written comment. As with air permits,
13 Ecology has the discretion to hold a public hearing on an application for a 401 Certification if it
14 "determines there is sufficient public interest" in the application. WAC 173-225-030(3).

15 When an applicant seeks a 401 Certification and 404 Permit, Ecology typically
16 coordinates the public notice and public hearing process with the Army Corps of Engineers
17 (Army Corps), the agency responsible for issuing 404 Permits. The Army Corps promulgated
18 regulations addressing an applicant's modification of the project proposed in its 401/404
19 application. Those regulations specifically provide that the district engineer is to "issue a
20 supplemental, revised, or corrected public notice if in his view there is a change in the
21 application data that would affect the public's review of the proposal." 33 CFR § 325.2(a)(2).
22 Ecology follows a similar approach with respect to the issuance of new notice for a 401
23 Certification. In those instances where the Army Corps elects not to issue a new notice but
24 Ecology has determined that such notice is necessary, Ecology will issue its own revised public
25 notice. Consequently, at times Ecology will require new notice for a 401 Certification while the
26 Army Corps will not require one for a 404 Permit.

1 The applicant proposes several modifications to its original application that render its
2 original application obsolete. It is very likely that the changes to the application would affect the
3 public's review of the water quality impacts in the project area. The public should be given the
4 opportunity to examine and comment on the proposed changes.

5 Moreover, a 401 Certification has not been issued. While the applicant asserts that it is
6 confident that it will be able to reach an accommodation with the 401 Certification team, no
7 agreement has been reached. To the extent that the changes to the project will result in changes
8 to the applicant's proposed mitigation or will require the inclusion of conditions in the 401
9 Certification to ensure the protection of water quality, the public should be provided an
10 opportunity to submit comments on the revised application. Allowing the public comment
11 would be consistent with the process followed by Ecology when it requires new public notice for
12 a project needing a 401 Certification.

13 As with the air permit, the Council should require the applicant to submit a new
14 application incorporating its proposed changes and provide the opportunity for public comment.
15 If sufficient public interest is expressed in the water quality aspects of the modified proposal, the
16 Council should hold a public hearing.

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III. CONCLUSION

For the reasons set forth above, Ecology asserts that the requirements of the Clean Air and Clean Water Acts envision the solicitation of additional public comment on the applicant's proposed changes to its application. If the Council finds that there is sufficient public interest in the air and/or water quality aspects of the project, a public hearing should also be held.

DATED this ____ day of March, 2001.

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